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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners- Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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No. _____

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners- Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on November 2, 2001. The opinion is reported at 270 F.3d 743 (9th Cir. 2001). A copy of the opinion is attached to this petition, as Appendix A. On November 21, 2001, Petitioner-Appellee's motion to stay issuance of the mandate, was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA)28 U.S.C. § 2254 et seq.

STATEMENT OF THE CASE

On November 4, 1995, Andrade and a female entered a K-Mart store in Ontario, California, and proceeded to the electronics department. Andrade looked around, selected some videotapes and stuffed them inside his trousers. Andrade looked around again, grabbed some more tapes, and stuffed them inside his trousers. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $84.70. Appendix A, at 11.

Two weeks later, on November 18, 1995, Andrade and two females entered a K-Mart store in Montclair, California, and proceeded to the electronics department. Andrade selected a videotape and put it down the waist of his pants. Andrade selected two more tapes and went behind a

partition. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $68.84. Appendix A, at 11.

Following a jury trial, Andrade was convicted of two counts of petty theft with a prior conviction (Cal. Penal Code §§ 484, subd. (a), 486, 666), and the jury found true additional allegations that Andrade had sustained three prior serious or violent felony convictions within the meaning of California's three-strikes law (Cal. Penal Code § 667, subds. (b) through (i)). Appendix A, at 12. Thereafter, the Superior Court of the State of California in and for the County of San Bernardino sentenced Andrade to two consecutive indeterminate terms of twenty-five years to life in state prison. Appendix A, at 12. Subsequently, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Appendix A, at 12. Thereafter, the California Supreme Court denied further review. Appendix F.

Based on an application made pursuant to 28 U.S.C. § 2254, the United States District Court for the Central District of California denied relief, finding the California Court of Appeal's determination of the Eighth Amendment claim was neither contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent. Appendix D, at 64; Appendix C, at 56-59; Appendix B. Subsequently, the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the matter with instructions to issue the writ of habeas corpus if, within 60 days following issuance of the mandate, the State has not resentenced Andrade. Appendix A, at 43-44.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Ninth

Circuit's decision, finding California's three-strikes law as applied in this case violates the Eighth Amendment, decided an important federal question, i.e., the constitutionality of California' principal recidivist sentencing law, in a way that conflicts with, and reaches a conclusion contrary to, relevant decisions of this Court.

2. The United States Court of Appeals for the Ninth Circuit's decision, finding California's three-strikes law as applied in this case violates the Eighth Amendment, conflicts with the standard of review in habeas corpus cases as prescribed by Congress and involves an important question of law that needs to be settled by this Court.

3. The methodology prescribed by the Ninth Circuit for determining whether a state court's determination of a federal habeas is entitled to due deference is contrary to the proper standard of review and in conflict with the decision of another United States Court of Appeals.

ARGUMENT

I.

CALIFORNIA'S THREE STRIKES LAW DOES NOT VIOLATE THE EIGHTH AMENDMENT WHEN IT RESULTS IN A TWENTY-FIVE-YEARS-TO-LIFE PRISON SENTENCE FOR A DEFENDANT CONVICTED OF PETTY THEFT WITH A PRIOR THEFT-RELATED CONVICTION

The Ninth Circuit held California's three-strikes law, as applied in this case, was unconstitutional because the sentence imposed was grossly disproportionate to Andrade's crimes. Appendix A, at 42-43. The decision of the Ninth Circuit was fundamentally flawed because it failed to properly apply this Court's jurisprudence when it evaluated Andrade's sentence.

In the light of Andrade's recidivist status, having previously been convicted of three serious or violent felony crimes as defined by California law, an aggregate indeterminate sentence of fifty years to life in state prison was not one of the "exceedingly rare" terms of imprisonment prohibited as cruel and unusual punishment by the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), quoting *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3002, 77 L. Ed. 2d 637 (1983).

The question presented, whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction, is an important federal question because the Ninth Circuit's decision conflicts with relevant decisions of this Court and because of the overarching

importance of the issue to the criminal justice system in California.[1/]

At the heart of the Ninth Circuit's decision is a determination that an Eighth Amendment challenge in a non-capital case requires intercase proportionality review. Within the literature of this Court, there are three modern cases which address the Eighth Amendment and proportionality. In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), this Court questioned whether the Eighth Amendment includes a proportionality guarantee in non-capital cases. This Court concluded that it could be argued without fear of contradiction by any decision of this Court that, for felonies, the length of the sentence was purely a matter of legislative prerogative. Thus, this Court upheld a life sentence for a defendant who obtained $120.75 by false pretenses, and whose only prior convictions were for fraudulent use of a credit card to obtain $80.00 worth of goods and passing a forged check in the amount of $28.36. *Rummel v. Estelle*, 445 U.S. at 271-72, 274.

Noting that outside the context of capital punishment successful challenges to the proportionality of a sentence have been exceedingly rare, this Court further explained that the state

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1. Notwithstanding the Ninth Circuit's attempt to curtail the impact of its decision, it is widely recognized that, unless repudiated, this decision will open the floodgates of litigation on nearly all three-strikes sentences. See, Greg Winter, "California Appellate Ruling Aids Foes of 3-Strike Law," *The New York Times*, December 10, 2001, at A14 [57% of the 7,000 felons serving life sentences under the California three-strikes law were imprisoned for non-violent offenses, including 644 felons who were convicted of possession of a controlled substance and 340 who were convicted of petty theft]. According to the *New York Times* report, public defenders across the state are digging-up old cases to mount a broad challenge to California's three-strikes law; Los Angeles County public defenders are looking through more than 500 cases involving defendants who received 25 years-to-life sentences, and Kern County public defenders hope to reduce or overturn as many as 350 sentences.

has a legitimate interest in "dealing with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 271-72, 285. This Court said the strength of this interest is not necessarily affected by the presence or absence of violence during the commission of the offense, and therefore a state is entitled to separate a recidivist offender from society for a longer period of time than a first-time offender. *Id.* at 284-285.

In *Solem*, the defendant was sentenced pursuant to a state recidivist statute to life imprisonment without the possibility of parole for writing a no account check for $100. *Solem*, 463 U.S. at 281-82. The defendant had six nonviolent prior convictions, "none [of which] was a crime against a person". *Id.* at 279-80. Those convictions included third-degree burglary, grand larceny, obtaining money under false pretenses, and driving while intoxicated. *Id.*. In a five-to-four opinion, this Court adopted a three-prong "proportionality analysis" to determine whether the length of imprisonment constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 292. This analysis considers the following factors: (1) the gravity of the offense relative to the harshness of the penalty, which may include a consideration of any prior convictions that support the sentence under a recidivist sentencing scheme; (2) the sentences imposed on other criminals in the same jurisdiction for different offenses; and (3) the sentences imposed on criminals in other jurisdictions for the same offense. *Id.* at 292-94, 296-97. After applying this analysis, this Court concluded the defendant's sentence violated the Eighth Amendment. *Id.* at 303. Significantly, while *Solem* embraced a different analysis than that applied in *Rummel*, the *Solem* court twice cited *Rummel* with approval and noted that *Rummel* is controlling ... in a similar factual situation. *Solem*, 463 U.S at 296-97, 304 fn.32. Moreover, the four dissenting justices vigorously disputed the proposition that noncapital cases are subject to a proportionality guarantee, and criticized the majority for ignoring or distorting

the holding in *Rummel*, decided only three years earlier. *Id.* at 304-15.

More recently, in *Harmelin v. Michigan*, this Court found itself irreconcilably split on the question of whether the Eighth Amendment includes a proportionality guarantee in noncapital cases, although it upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine. In a separate opinion, two justices held there was no proportionality guarantee in non-capital cases. *Harmelin*, 501 U.S. at 965. In a plurality concurring opinion, three justices agreed that, although the Eighth Amendment does not require strict proportionality between crime and sentence, it does forbid those "extreme sentences which are 'grossly disproportionate' to the crime." *Id.* at 1001.

Finding that the Eighth Amendment included a "narrow proportionality principle", the plurality opinion acknowledged that "its precise contours are unclear." *Id.* at 998. Despite the lack of precision, the plurality opinion identified four principles for determining the "uses and limits of proportionality review." *Id.* at 998. The first principle is that the fixing of prison terms for specific crimes is generally a legislative, rather than a judicial, matter and reviewing courts should therefore grant substantial deference to that authority. *Harmelin*, 501 U.S. at 998-99. The second principle provides that the Eighth Amendment does not mandate any particular penalogical theory and, therefore, state legislatures have plenary power to grant "different weights at different times to the penalogical goals of retribution, deterrence, incapacitation and rehabilitation." *Id.* at 999. The third principle is that the very nature of the federal structure means there will inevitably be marked differences in the theory of sentencing and the lengths of sentences. Thus the states have independent power to articulate societal norms through the criminal law; and the fact that one state has more severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. *Id.* at 1000. The fourth principle is that proportionality review should be informed by "objective factors

to the maximum extent possible." *Id.*, *quoting Rummel*, 455 U.S. at 274-75.

In the present case, the Ninth Circuit utilized a *Solem* analysis and compared the punishment and the crime. Regarding the harshness of the penalty, the Ninth Circuit reasoned that because California's three-strikes law has an unique feature depriving a sentencing judge from exercising discretion to impose the sentences concurrently, and because Andrade's sentence may not be reduced by credit for good behavior or working in prison, the penalty was exceptionally harsh where Andrade must serve a minimum of fifty years before he is eligible for parole.[2/] Therefore, the Ninth Circuit found Andrade's sentence substantially more severe than the life sentence involved in *Rummel* and the functional equivalent of the "life without the possibility of parole" sentences involved in *Solem* and *Harmelin*. Appendix A, at 28.

Regarding the gravity of the offense, the Ninth Circuit reasoned Andrade's offenses involved neither violence nor the

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2. The Ninth Circuit is somewhat incorrect in this regard. The Ninth Circuit was referring to California Penal Code, § 667(c)(6), which provides in relevant part that if there is a current conviction for more that one count not arising from the same set of operative facts, the trial court shall sentence the defendant consecutively on each count. However, the Ninth Circuit failed to consider *People v. Superior Court (Romero)* 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996), and *People v. Garcia*, 20 Cal. 4th 490, 85 Cal. Rptr. 2d 280 (1999). In *Romero*, the California Supreme Court held sentencing courts have the power, pursuant to California Penal Code § 1385, to dismiss strikes in the interests of justice. *Romero*, 13 Cal. 4th at 529-530. In *Garcia*, the California Supreme Court held sentencing courts have discretion to strike prior conviction allegations on a count by count basis. *Garcia*, 20 Cal. 4th at 499-500. Therefore, although technically not discretion to sentence concurrently, a sentencing court can impose a sentence equivalent to concurrent sentences by striking priors as to one or more current convictions.

threat of violence, and that the offenses were elevated to "wobbler" status, i.e., punishable either as a misdemeanor or felony, because of the prior theft-related conviction.[3/] Appendix A, at 30.

Concluding there was an inference of gross disproportionality, the Ninth Circuit then conducted intra-jurisdictional and inter-jurisdictional comparisons of the sentence. On an intra-jurisdictional basis, the Ninth Circuit found Andrade's fifty years-to-life sentence was exceeded in California only by sentences imposed for first-degree murder and a few other violent crimes, and was longer than sentences imposed for other third-strike offenders. Thus, the Ninth Circuit concluded, the comparison supported an inference that the sentence was grossly disproportionate.[4/] Appendix A, at 32.

On an inter-jurisdictional basis the Ninth Circuit acknowledged that four other States have sentencing schemes which imposed lengthy sentences for petty theft where the defendant was a recidivist, but distinguished those jurisdictions from California on various grounds. As to Rhode Island, the Ninth Circuit noted the value of the merchandise Andrade took was too low to qualify as a felony there, and that in Rhode Island the defendant must serve separate terms of imprisonment in order to qualify as an habitual offender, whereas, Andrade's

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3. The Ninth Circuit is incorrect. Under California law, in order to elevate a petty theft to "wobbler" status, the defendant must not only have sustained a prior theft-related conviction, he also must have either served a term in a penal institution for the prior offense, or he must have been imprisoned as a condition of probation for the prior offense. Cal. Penal Code § 666. Thus, the prior offense must have been something more serious than a simple petty theft.

4. The Ninth Circuit's analysis is somewhat strained. The Court compared Andrade's aggregate sentence, which is actually two sentences imposed consecutively, to the maximum sentences for single convictions and to three-strikes sentences imposed for only one current conviction.

prior convictions arose in a single proceeding. As to West Virginia, the Ninth Circuit noted the West Virginia Supreme Court has held that a life sentence imposed on a non-violent recidivist violates that State's constitution. Regarding Texas, the Ninth Circuit conceded Andrade could receive up to forty years in prison but noted Texas has a generous parole policy. Regarding Louisiana, the Ninth Circuit concluded that a sentence such as Andrade received would be vulnerable to challenge as excessive under the Louisiana Constitution. In sum, the Ninth Circuit concluded "[t]he possibility Andrade might have received a comparable sentence in other jurisdictions does not render his sentence constitutional under the Eighth Amendment." Appendix A, at 35-41.

As is plainly evident, the Ninth Circuit's decision is a result-oriented decision. Moreover, the Ninth Circuit failed to apply *Solem's* three-prong "proportionality analysis" in a reasonable, even-handed manner. Both the gravity-of-the-offense/harshness-of-penalty analysis, as well as the intra-jurisdictional analysis, founder on substantially incorrect factual predicates. Moreover, the disingenuity of the inter-jurisdictional analysis is clearly revealed by the Ninth Circuit's conclusion which essentially provided that, even if an inter-case proportionality analysis supported Andrade's sentence, the Ninth Circuit would nonetheless find it unconstitutional.

More importantly, the Ninth Circuit completely failed to follow the revised *Solem* analysis as articulated in *Harmelin*. Rather the Ninth Circuit focused on how Andrade's crimes would have been viewed had they been first offenses, persistently referring to them as misdemeanor conduct. However, in California they were not misdemeanors. The People of the State of California, by their duly elected Legislature, have determined that once a person has been convicted of a theft-related offense and served jail-time or a prison term for that offense, a subsequent theft is a felony regardless of the value of the property taken. As *Harmelin* implicitly recognized, the California Legislature has plenary authority to make that determination.

In fact, any suggestion that the conduct is misdemeanor in nature misses the point. The California Legislature's determination that the theft of property of any value is a felony if there is a prior theft-related offense, is no different than the legislature's determination that theft of property exceeding a value of $400 is a felony. California Penal Code § 487, subdivision (a). Both involve the legislature drawing lines that reflect its conclusions regarding society's interests. Surely, the California Legislature is entitled to conclude that a person who demonstrates a willingness to commit serious or violent felonies on more than one occasion, and who subsequently demonstrates a continued unwillingness to be law-abiding, no matter how trivial the offense, poses a significant danger to society. Nothing in the Constitution requires society to wait for another person to be victimized by another serious or violent crime before isolating such a defendant who has demonstrated a propensity for serious or violent crime, for a substantial period of time. Thus, the Ninth Circuit gave no deference, let alone substantial deference, to the California Legislature's broad authority to determine the types and limits of punishments for crimes.

Moreover, the People of the State of California, by their duly elected Legislature and by ballot initiative, have determined that a person who commits a serious or violent felony on two or more occasions and who subsequently commits another felony offense, albeit not a serious or violent felony, poses a significant danger to society such that he or she must be imprisoned for no less than twenty-five years to life. Such a determination clearly comports with the second *Harmelin* principle. No consideration of this principle is apparent in the Ninth Circuit's decision.

Additionally, the Ninth Circuit's analysis completely failed to consider (or even acknowledge), the third *Harmelin* principle. The fact that California's recidivist sentencing scheme may be the most harsh amongst the states does not render it unconstitutional; one state has to be the most severe. Moreover, any suggestion to the contrary ignores the fact that

California's situation is simply different than that of the other states. California has the largest population and, accordingly, the greatest crime problem and greatest problem with criminal recidivism. California is entitled to evaluate the relationship between the crime rate and recidivism, and incapacitate habitual offenders in accordance with its construction of the results. If the State's independent power to articulate societal norms through its criminal law is to be respected, a great deal more consideration must be shown than is apparent in the Ninth Circuit's decision.

Finally, the Ninth Circuit failed to be guided by objective factors to the maximum extent possible. Instead, it relied on subjective factors. For example, because Andrade was thirty-seven years old at the time of his sentencing and the life expectancy of a thirty-seven-year-old American male is seventy-seven years, the Ninth Circuit found Andrade's sentence the functional equivalent of a life without the possibility of parole sentence. Appendix A, at 28-29. The Ninth Circuit's reasoning manifests the very problem the *Harmelin* plurality tried to address when it mandated the use of objective factors, i.e., it results in an unworkable system. For example, would the sentence imposed on Andrade be constitutional if Andrade had been twenty years old at the time of sentencing? Would it be constitutional if it resulted in two consecutive twenty-year sentences with parole eligibility after a minimum of forty years, i.e., when Andrade was still within his life expectancy? What if the National Center for Health Statistics revises its estimate of the life expectancy of a 37-year-old American male? Surely, the various health profiles of defendants will affect their life expectancies. Therefore, to what extent is a defendant's individual health status at the time of sentencing a factor in the constitutionality of a sentence?

After all is considered, when determining whether California's three-strikes law, as applied, was constitutional, it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions. Thus, the Ninth Circuit has decided an important question of federal law in a

way that conflicts with relevant decisions of this Court. Further, as noted in footnote 1, *infra*, if left unchecked, the decision in the instant matter will open the floodgates of litigation to unprincipled federal review of thousands of sentences in California. Therefore, a writ of certiorari should issue.

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II.

THE NINTH CIRCUIT FAILED TO AFFORD THE STATE COURT'S DETERMINATION, THAT ANDRADE'S SENTENCE DID NOT VIOLATE THE EIGHTH AMENDMENT, DUE DEFERENCE

In the course of resolving Andrade's appeal, the California Court of Appeal held Andrade's sentence did not violate the Eighth Amendment prohibition of cruel and unusual punishment. Appendix E, at 76-79. In 1998, long after enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214, Andrade filed an application pursuant to 28 U.S.C. § 2254. The district court denied the application finding the state-court decision was neither contrary to, nor did it involve an unreasonable application of, clearly established federal law as determined by this Court. Maintaining it applied a de novo standard of review, the Ninth Circuit reversed the judgement of the district court. Appendix A, at 7, 43-44.

The Ninth Circuit's decision is flawed. In light of the conflict and lack of clarity in the existing jurisprudence concerning the Eighth Amendment and proportionality, it cannot be said that the state-court determination involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1).

28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. "Federal law as determined by this

Court" refers to "the holdings, as opposed to the dicta of [the Court's] decisions as of the time of the relevant state court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The federal court independently determines whether a rule is "clearly established" for this purpose. *Id.* at 382. To make this determination, the federal court employs the same analysis used to determine whether a rule is "old" under the doctrine of *Teague v. Lane*,[5] except that the court looks only to this court's jurisprudence. *Id.* at 380-84, 412, 416. Thus, for § 2254(d)(1) purposes, a rule is "clearly established" if it is "'dictated by precedent at the time the defendant's conviction became final.'" *Id.* at 381, *quoting Teague*, 389 U.S. at 301.

A rule is not dictated by precedent if a survey of the existing legal landscape shows reasonable jurists differ about the outcome. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); *see also, Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 108 L. Ed. 2d 307 (1990) [stating *Teague* test as whether a rule is "susceptible to debate among reasonable minds"].

Williams addressed the distinction between the "contrary to" and "an unreasonable application of" provisions of § 2254(d)(1). A state court decision can be contrary to this Court's "clearly established" precedent in two ways: (1) if the state court applies a rule that contradicts the governing law set forth in this Court's jurisprudence; or (2) if the state court confronts facts materially indistinguishable from a relevant precedent of this Court and arrives at a result opposite to the one this Court reached. *Williams*, 529 U.S. at 405-06. A state court decision can also involve an unreasonable application of this Court's precedent in two ways: (1) if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case; or (2) if the state court either unreasonably extends a legal

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5. 389 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

principle from this Court's jurisprudence to a new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. *Williams*, 529 U. S. at 407.

Although the term "unreasonable" is difficult to define, in light of the fact that Congress specifically used that word and not a word such as "erroneous" or "incorrect", an unreasonable application of federal law is different from an incorrect application of federal law. *Id.* at 410-11. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Williams*, 529 U. S., at 409, 411.

In this case, the Ninth Circuit held that, in the light of *Rummel*, *Solem* and *Harmelin*, the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life in prison was clearly established by the time of the State court's determination. Appendix A, at 41. In this regard, the Ninth Circuit chides the State court for relying almost exclusively on *Rummel* and disregarding *Solem*. Appendix A, at 41-42.

The Ninth Circuit's analysis is difficult to accept given that this Court's most recent treatment of the Eighth Amendment and proportionality review demonstrates a far from clear assessment. *United States v. Kratas*, 45 F.3d 63, 67 (4th Cir. 1995) [it is unclear in light of *Harmelin* whether *Solem's* three-part proportionality test is still relevant in non-capital cases]. In fact, this Court has said as much. In *Harmelin*, Justice Scalia expressly stated that *Solem* " was scarcely the expression of clear and well-accepted constitutional law." *Harmelin*, 501 U.S. at 965. Similarly, Justice Kennedy said that, although they could be reconciled, this Court's "proportionality decisions have not been clear or consistent in all respects" and that, although this Court's decisions have recognized a proportionality principle, its "precise contours are

unclear." *Harmelin*, 501 U.S at 996-998.

Had the Ninth Circuit properly reviewed the State court's decision it would have recognized that the application of the Eighth Amendment to noncapital cases involving non-violent offenders was far from clearly established. In light of *Harmelin*, it appears this Court has found proportionality a factor in capital cases and in non-capital cases which involve a "life without the possibility of parole" sentence. It certainly does not establish that proportionality is a factor to be considered in sentences for a term of years, particularly since *Rummel* supports an opposite conclusion. Moreover, as Circuit Judge Sneed's concurring in part and dissenting in part opinion in the instant matter noted, "in the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." Appendix A, at 48-49. Thus, as the dissent concludes, even if the State court determination was incorrect, it was not unreasonable. Appendix A, at 52-53.

After all is considered, when determining whether State court's determination that Andrade's two consecutive 25-years to life sentence for two counts of petty theft with a prior conviction, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1), it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions. Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Moreover, the Ninth Circuit's refusal to follow the dictates of the AEDPA undermines the careful balance Congress struck when it enacted that law, between the state and its courts on one hand, and the federal courts on the other. Therefore, a writ of certiorari should issue.

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III.

THE METHODOLOGY PRESCRIBED BY THE NINTH CIRCUIT IS CONTRARY TO THE STATUTORY STANDARD OF REVIEW AND IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS

The question of whether, in determining if a state court's determination of a federal constitutional claim is entitled to deference, the federal habeas corpus court must first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court, concerns the correct methodology to be applied by a federal court in analyzing a habeas corpus claim under the standard of review prescribed by 28 U.S.C. 2254(d)(1). A writ of certiorari should be granted because the Ninth Circuit has entered a decision on this important matter that conflicts with the relevant decisions of this Court, and conflicts with a decision of the United States Court of Appeals for the Fourth Circuit.

In *Van Tran v. Lindsey*, 212 F.3d 1143, 1154-1155 (9th Cir. 2000), cert. denied 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 274 (2000), the Ninth Circuit held that, when analyzing a habeas corpus claim utilizing the standard of review prescribed at § 2254(d)(1), before deciding whether the state court determination was contrary to, or an unreasonable application of clearly, established federal law as determined by this Court, a federal court must first consider whether the State court's determination was clearly erroneous. According to *Van Tran*, such a methodology promotes clarity in the Ninth Circuit's own constitutional jurisprudence and provides guidance to the state courts which can look to the federal courts' decisions for their persuasive value. *Van Tran* 212 F.3d at

1155.[6] *Van Tran* also cited *Weeks v. Angelone*, 528 U.S. 225, 235-237, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), where this Court rendered an independent decision on the merits of the petition based on this Court's precedents and then determined whether the AEDPA provisions barred relief, is support of its holding.

In *Bell v. Jarvis*, 236 F.3d 149, 161-162 (4th Cir. 2000), *cert. denied sub. nom Bell v. Beck*, ___ U.S. ___, 122 S. Ct. 74, 151 L. Ed. 2d 39 (2001), the Fourth Circuit rejected the *Van Tran* methodology. *Bell* explained that the *Van Tran* requirement seemed to be predicated on a decision to equate an "unreasonable" state court decision within the meaning of § 2254(d)(1) purposes with one that is "clearly erroneous." *Bell*, 236 F.3d at 162, fn. 9. Citing this Court's *Williams* decision, *Bell* held that "unreasonable" and "clearly erroneous" could not be equated. *Id.* at 162. *Bell* further noted that, in *Francis v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000), the Second Circuit concluded the *Van Tran* requirement focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error." *Id.* at 162. *Bell* thus rejected the idea that a federal court's independent opinion on the merits of any constitutional claims could have any determinative effect on a case, or any precedential value for state courts, finding such an independent opinion would constitute, at best, a body of constitutional dicta. *Id.* at 162.

Concerning *Van Tran*'s suggestion that the methodology which it adopted would provide guidance to the state courts, *Bell* observed there were no persuasive reasons for federal habeas courts to offer opinions on constitutional questions in order to provide guidance to the state courts, nor was there any reason to presume state courts needed the

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6. This reasoning evidences the conceit of that federal court that it knows the Constitution better than the state courts. In light of the AEDPA, it appears Congress has decided otherwise.

guidance. *Bell*, 236 F. 3d. at 162. Finally, *Bell* rejected *Van Tran's* reliance on *Weeks*, concluding it could find no implied requirement that lower federal courts are to render an independent decision on the merits of a claim and noting that *Weeks* did not require such a methodology. *Id.* at 161, fn. 8.

In the present case, citing *Van Tran*, the Ninth Circuit first addressed the correctness of the State court's determination and decided it was incorrect. The Ninth Circuit then concluded the state-court determination involved an unreasonable application of clearly established Supreme Court law. Finding the state-court determination irreconcilable with *Solem*, the Ninth Circuit then held the state-court determination was "clear error." Appendix A, at 18-19, 41-43.

Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, and with a decision of the Fourth Circuit. As *Bell* anticipated, the Ninth Circuit has equated "unreasonable" with clearly erroneous. But as the Second Circuit implied in *Francis*, 221 F.3d at 110, equating those terms fails to address an "increment of wrongness beyond error." Moreover, that "increment" seems implicit in section 2254(d)'s requirement, as construed by *Williams*, 529 U.S. 363, that relief cannot be granted unless the erroneous state court determination is also "objectively unreasonable." *Id.*, at 405-409. Thus, the Ninth Circuit's determination conflicts with this Court's decision in *Williams*.

In addition, the Ninth Circuit's methodology leads to the inefficient use of judicial resources. Continued adherence to *Van Tran's* mandate forces habeas courts to waste resources determining if a state court determination was wrong, and then deciding if there is clear precedent to the contrary. Thus, the *Van Tran* methodology always requires a habeas court to engage in two analyses. Under the Fourth Circuit's approach, however, a habeas court can resolve a petition more efficiently by first determining if there was no precedent, and going no further if the answer is no.

Finally, the Ninth Circuit's determination here fails to take into account this Court's more recent decision in *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). In *Penry*, this Court first determined whether the state court determination was contrary to, or an unreasonable application of, this Court's established precedent. Concluding that the state court's determination did not violate either prong of the statutory standard of review, this Court held the defendant was not entitled to any relief. *Penvy*, 121 S. Ct. at 1919. In so doing, this Court at least impliedly rejected the *Van Tran* methodology Nevertheless, the Ninth Circuit persists in marching to the beat of its own drum.

After all is considered, when deciding the manner for determining if a state court's determination of a federal constitutional claim is entitled to deference, it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions and entered a decision in conflict with the decision of another United States Court of Appeals. Therefore, a writ of certiorari should issue.

CONCLUSION

Accordingly, Petitioners-Appellees respectfully request a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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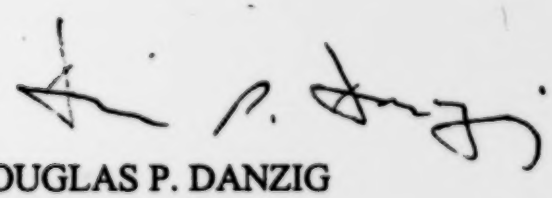

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